

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: R-219987.2

DATE: January 21, 1986

MATTER OF: W.H. Smith Hardware Company

DIGEST:

1. Determination that solicitation's inspection requirements needed to be upgraded based on user complaints and agency tests constitute a compelling reason to cancel a solicitation since award under the original solicitation would not meet the agency's needs.
2. An agency properly may cancel a solicitation after bid opening regardless of when information justifying cancellation first surfaces.
3. The exception in the Federal Acquisition Regulation to allow for the late modification of an "otherwise successful bid" is not applicable to the low bid submitted in response to a defective solicitation. A bid which is modified after opening to cure solicitation defect cannot be accepted because contracts awarded under sealed bidding procedures must be made on the same terms as offered all bidders.

W.H. Smith Hardware Company protests the cancellation after bid opening of solicitation No. DLA700-85-B-1167, issued by the Defense Construction Supply Center (DCSC) for 2,923 aircraft fueling hose assemblies. DCSC canceled the solicitation in order to alter the specifications to require higher-level contractor quality control. Smith contends that the cancellation was improper and requests that the solicitation be reinstated and the contract awarded to it as the low bidder.

We deny the protest.

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The solicitation was issued on April 30, 1985 and amended on July 25 to increase the quantity and change the specifications. On the August 9 bid opening date, DCSC received three bids, the lowest of which was submitted by Smith. Meanwhile on May 17, based on a number of complaints about the poor quality of the fueling hoses, DCSC's Quality Assurance Specialist requested the Navy to test two samples of the hose. On September 6, the Navy reported negative test results on the samples. Based on this information, the quality specialist determined that serious deficiencies existed in the fueling hoses that created potential safety hazards and endangered mission capability. He recommended that the solicitation be amended to upgrade the quality of the fueling hose assemblies by requiring a higher-level contractor quality control specified in MIL-I- 45208. Since the quality specialist made the recommendation after bid opening, DCSC was unable to amend the solicitation. Instead, it canceled the solicitation with the intention of issuing a new solicitation that would include the more stringent inspection requirement.

Smith contends that cancellation was unnecessary, because poor workmanship was the cause of deficiencies existing in the fueling hose assemblies. It argues that more stringent inspection procedures are not needed to correct the problems. According to Smith, a hose size change which was incorporated into the solicitation by the July 25 amendment was sufficient to alleviate the fitting problems DCSC is experiencing with its present hoses. In addition, Smith insists that if the agency wishes to include MIL-I-45208 inspection procedures, it will comply with those requirements under its current bid with no increase in price.

Contracting officials have broad discretion in determining whether a solicitation should be canceled and the requirement reprocured. Power Equipment Inc., B-213428.3, Oct. 22, 1984, 84-2 CPD ¶ 427. Due, however, to the potential adverse impact on the competitive bidding system of canceling an invitation after bid prices have been exposed, contracting officers, in the exercise of their discretionary authority, must find that a compelling reason exists for the cancellation. Commercial Envelope Mfg. Co., Inc., B-213272, Feb. 15, 1984, 84-1 CPD ¶ 206. The presence of a requirement in a solicitation which is not adequate to meet an agency's needs can constitute a compelling reason to cancel a solicitation. See Energy Efficient Improvements, B-218014.3, Apr. 24, 1985, 85-1 CPD ¶ 466. The fact, however, that the terms of a solicitation are inadequate in some way does not by itself constitute a compelling reason.

North American Laboratories of Ohio, Inc., 58 Comp. Gen. 724 (1979), 79-2 CPD ¶ 106. A compelling reason exists only where award under the deficient solicitation would prejudice other bidders or such award would not serve the government's actual needs. Summerville Ambulance, Inc., B-179049, July 1, 1985, 85-2 CPD ¶ 4.

Here, we conclude that the agency did have a compelling reason to cancel the solicitation. It is clear from the record that the agency believed that the inspection scheme in the solicitation was inadequate to insure that it did not accept defective fueling hoses. Its determination was based both on numerous complaints it received from users in the field regarding the fuel hoses supplied under prior contracts, and on the negative results of tests conducted by the Navy.

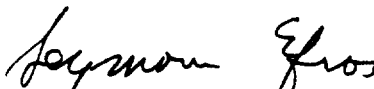
The protester insists that the problems were the result of a poor match of the hose and coupling by the prior contractor and argues that the problem would be cured by the specification change incorporated by the July 25 amendment together with the original inspection requirements. The Navy test report indicates that the fueling hoses were defective in a number of respects (weakness of adhesion at the tube layer, wrinkles and irregularities in the reinforcement fabric etc.) not just in the fit of the hose and coupling. While it may be true, as the protester contends, that the fueling hoses would not fail if made in accordance with the solicitation specification, in view of the possibility that failure could well result in personnel injury and considering the past problems with this item, we do not think that the agency acted unreasonably in deciding that the inspection provisions in the solicitation do not meet its needs and canceling the solicitation.

In any event, Smith contends that the agency should not be permitted to cancel the solicitation after bid opening when it knew or should have known of the defects in the fueling hoses in time to amend the solicitation prior to the bid opening. While it is unfortunate that the agency did not have the testing completed earlier, the fact that problems with the quality of the fueling hoses had been known prior to bid opening does not preclude cancellation after opening, if the solicitation proves inadequate. Ridg-U-Rak, Inc.--Reconsideration, B-207124.2, Sept. 24, 1982, 82-2 CPD ¶ 272.

Although Smith is not convinced, that higher level inspection procedures are necessary, it argues that it should be permitted to perform the contract under the

initial solicitation in accordance with the agency's new inspection requirements. It states that it will amend its bid to include the more stringent inspection requirements at its current bid price. The protester concludes that such an amendment of its already low bid can be accepted pursuant to the Federal Acquisition Regulation, 48 C.F.R. § 2.214-7(e) (1984), which states that a late modification of an otherwise acceptable bid which makes the terms more favorable to the government may be accepted at any time. The prerequisite for permitting a late modification is that the bid as originally submitted must already be the low acceptable bid. The W.H. Smith Hardware Co., B-219405.2, Oct. 25, 1985, 85-2 CPD ¶ 460. Since here the agency has decided that the solicitation under which the protester's bid was submitted did not fully represent the agency's actual minimum needs, it follows that the acceptance of any of the bids, including the protester's bid, would result in an award which would not serve the government's actual needs. Consequently, a bid which is responsive to a defective solicitation is not an "otherwise successful bid" to which 48 C.F.R. § 52.214-7 applies. In essence, the protester wants the agency to award it a contract whose material terms are at variance with the IFB. Such an award would be improper since the award of a contract pursuant to the statute governing sealed bidding must be made on the same terms as offered all bidders. 10 U.S.C.A. § 305(b)(3). (West Supp. 1985); U.S. Materials Co., B-216712, Apr. 26, 1985, 85-1 CPD ¶ 471.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel